

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP483

Cir. Ct. No. 2011SC1755

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SCOTT HAMBLY,

PLAINTIFF-APPELLANT,

V.

KRISTOFER M. LEWIS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
SANDY A. WILLIAMS, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Scott Hambly appeals from an order dismissing his small claims action against Kristofer M. Lewis. Hambly previously appealed

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the dismissal of the same small claims action. We construed his complaint as stating a claim for malicious prosecution and reversed. *See Hambly v. Lewis*, No. 2012AP710, unpublished slip op. ¶1 (WI App Aug. 15, 2012). On remand, Lewis moved to dismiss. At the motion hearing, Hambly agreed that the court had found probable cause in the underlying criminal case. The circuit court dismissed Hambly's complaint for failure to state a claim upon which relief can be granted. We affirm.

¶2 In 2011, Hambly filed a small claims complaint against Lewis, alleging that Lewis provided a false statement to the police that resulted in Hambly's arrest. Hambly was ultimately acquitted. Hambly asked the court to order Lewis to reimburse him \$10,000 in legal fees and other defense expenses. Lewis denied falsifying any statements. Lewis filed a motion to dismiss Hambly's complaint for failing to state a claim upon which relief could be granted, which the circuit court granted. Hambly appealed and we reversed, concluding that, liberally construed, Hambly's complaint alleged malicious prosecution. The elements of malicious prosecution are:

1. There must have been a prior institution or continuation of some regular judicial proceedings against the plaintiff in this action for malicious prosecution.
2. Such former proceedings must have been by, or at the instance of, the defendant in this action for malicious prosecution.
3. The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.
4. There must have been malice in instituting the former proceedings.
5. There must have been want of probable cause for the institution of the former proceedings.

6. There must have been injury or damage resulting to the plaintiff from the former proceedings.

Pollock v. Vilter Mfg. Corp., 23 Wis. 2d 29, 37, 126 N.W.2d 602 (1964) (citation omitted).

¶3 On remand, Lewis moved to dismiss, referring to the Wisconsin Circuit Court Access display for the underlying criminal case and arguing that the finding of probable cause therein estopped Hambly from arguing that there was a lack of probable cause. The circuit court asked Hambly about his initial appearance and preliminary hearing in the underlying criminal case and whether Hambly recalled a finding of probable cause. Hambly replied: “I only recollect one time from Judge Faragher saying we bind you over, we have probable cause; I only recall one time.” The circuit court replied: “Now, so you agree there was a finding of probable cause.” Based on the finding of probable cause, the circuit court dismissed Hambly’s complaint. Hambly does not challenge this finding of probable cause; he appeals the dismissal of his complaint.

¶4 Hambly’s first appeal came to us on a motion to dismiss. We reversed because Hambly’s complaint arguably stated a claim malicious prosecution. At the hearing on remand, Hambly repeatedly rejected the circuit court’s characterization of his lawsuit as one for malicious prosecution. Hambly acknowledged several times that there was a finding of probable cause, and he did not present any facts or develop any legal arguments to the contrary, nor does he on appeal. We will not independently develop a litigant’s argument. *Vesely v. Security First Nat’l Bank*, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App.

1988). Instead, Hambly kept insisting that his complaint was for defamation or slander.² Hambly's complaint was properly dismissed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

² If Hambly's complaint did state a claim for slander or defamation, such claim was barred by the two-year statute of limitations then in effect for intentional torts. WIS. STAT. § 893.57 (2009-10) (2009 Wis. Act 120, first applicable to injuries occurring on Feb. 26, 2010, changed this limitations period to three years.) Hambly's complaint alleges that Lewis's statements were made some time prior to May 2008. See *Scott Paper Co. v. Fort Howard Paper Co.*, 343 F. Supp. 229, 235 (E.D. Wis. 1972) (looking to time of publication in libel case to calculate accrual of action). Hambly filed his complaint on September 12, 2011. Even if we look outside the pleadings to the affidavit of Washington County Sheriff's Department Detective Mark Sette, Lewis made his statements in May 2009, still outside the applicable limitations period.

